

“Engaged in Business” Model Statute – Revisions as of June 17, 2015.

1 [DRAFTER’S NOTE: The following model definition of “retailer engaged in business”/
2 “engaged in business” is intended to be used in conjunction with the state law provision(s)
3 imposing an obligation to pay or collect and remit sales or use taxes. If the state law
4 provision imposing the obligation uses a different term—such as “vendor” or “seller” or
5 “doing business,” that term can be substituted.]

6
7 (a) Retailer engaged in business in this state.

8 “Retailer engaged in business in this state” as used in [this Article or Act imposing tax*]
9 means a retailer, whether or not authorized to do business in this state, that has a sufficient
10 connection with this state under the United States Constitution to be subject to sales and
11 use tax collection duties. “Retailer engaged in business in this state” specifically includes a
12 retailer that conducts any of the following activities in this state:

13
14 (1) Maintaining or using directly or indirectly, an office, place of distribution, sales
15 or sample room or place, warehouse or storage place, or other place of business,
16 whether through a related party, or agent, by whatever name called.

17
18 (2) Having a full or part-time employee acting on behalf of the retailer in this state.

19
20 (3) Having a representative, agent, salesperson, independent contractor, or any
21 other person acting or operating under the authority of the retailer or a related
22 party for the purpose of selling, delivering, installing, assembling, maintaining or
23 repairing the retailer’s products, or taking orders for or otherwise establishing or
24 maintaining a market [for tangible personal property and/or taxable services sold
25 by the retailer*] in this state.

26
27 (4) Owning or leasing real or tangible personal property;
28

1 (5) Having a related party acting under an agreement with or in cooperation with
2 the retailer that:

3
4 (A) owns or leases real or tangible personal property or performs services in
5 connection with the sale or solicitation of sales of [tangible personal property
6 and/or taxable services*] on behalf of the retailer, including services to
7 design and develop tangible personal property sold by the retailer; or

8
9 (B) uses trademarks, service marks, or trade names that are the same or
10 substantially similar to those used by the retailer.

11
12 (b) Presumption.

13
14 (1) A retailer making sales at retail [of tangible personal property and/or taxable
15 services *] into this state is presumed to be engaged in business in this state if:

16
17 (A) the retailer has an agreement, directly or indirectly, with one or more
18 residents under which, for a commission or other consideration based on
19 completed sales, the resident refers potential purchasers to the retailer,
20 directly or indirectly, whether by a link on an internet website, written or
21 oral presentation, or otherwise; and

22
23 (B) the cumulative gross receipts from sales by the retailer to purchasers
24 who are referred to the retailer by all residents with such an agreement is
25 greater than \$10,000 during the immediately preceding 12 months.

26
27 (2) The presumption created by Subsection (b)(1) may be rebutted by proof that,
28 during the preceding 12 months, no resident in the state with whom the retailer has
29 an agreement engaged in any solicitation in the state on behalf of the retailer that
30 would create a sufficient connection between the retailer and the state under the
31 United States Constitution for the state to impose sales and use tax collection duties.

1 Evidence to rebut the presumption may consist of a verified written statement from
2 each resident with whom the retailer has an agreement, obtained and provided in
3 good faith, that the resident did not engage in any such solicitation or other
4 activities in this state on behalf of the retailer during the preceding 12 months.
5

6 (3) An agreement for advertising services with a person or persons in this state, to
7 be delivered on television, radio, in print, on the Internet, or by any similar medium,
8 is not an agreement described in Subsection (b)(1) above, unless the person who is
9 a party to the agreement with the retailer also directly or indirectly solicits potential
10 customers in this state for the retailer through use of flyers, newsletters, telephone
11 calls, electronic mail, blogs, microblogs, social networking sites, or other means of
12 direct or indirect solicitation specifically targeted at potential customers in this
13 state. For purposes of this subsection, an agreement for services compensated for
14 with commissions or other consideration conditioned upon completed sales in this
15 state is not an agreement for advertising services.
16

17 (4) This Subsection (b) shall apply without regard to the date the retailer and the
18 resident entered into the agreement described herein.
19

20 (5) The 12 months before the effective date of this Act are included as part of the
21 preceding 12 months for purposes of this Act.
22

23 (c) For purposes of this Section, a person is a related party to the retailer if:
24

25 (1) the person and the retailer are component members of the same controlled
26 group of corporations under section 1563 of the Internal Revenue Code;
27

28 (2) the person is related to the retailer in a manner described under the provisions
29 of section 267 of the Internal Revenue Code; or
30

1 (3) the retailer and the person are entities such as a corporation, limited liability
2 company, partnership, estate, or trust, and the shareholders, members, partners, or
3 beneficiaries of one entity own in the aggregate directly, indirectly, beneficially, or
4 constructively at least 50 percent of the profits, capital, stock, or value of the other
5 entity.

6
7 (d) If a federal statute authorizes the imposition by this state of a duty to collect sales and
8 use tax on a retailer, then that retailer shall be deemed to be a retailer engaged in business
9 in this state.

10
11 (e) The definitions in this Section are applicable only to the taxes levied under [this Article
12 or Act*].

13
14 (f) The provisions of this Section are severable. If any provision of this Section or its
15 application is held invalid, this shall not affect other provisions or applications that can be
16 given effect without the invalid provision or application.

17
18 (g) This statute applies to sales made on or after [effective date].

19
20 *States can insert language within the brackets to correspond to their particular taxing
21 schema.

22
23
24 **ADDENDUM**

25
26 In April 2015, Tax Management/Bloomberg BNA released a special report
27 comprised of a survey of state tax departments. The survey covered a wide range of topics,
28 including nexus. For the nexus portion, the survey presented a number of different

1 scenarios, and asked states to respond whether the activities described were nexus-
2 producing (or non-nexus producing).

3 If the goal of the Uniformity Committee is to create a comprehensive model nexus
4 statute, the utility of the BNA survey becomes obvious. Staff reviewed the survey, and of the
5 scenarios presented, chose those that, based on the revenue agencies' responses, it
6 believed to be nexus producing. Those scenarios that were already covered by the draft
7 statute were left out. Some of the responses to the scenarios were close; these may have to
8 be discussed by the workgroup. It is anticipated that these nexus-producing activities will
9 be included in the model statute.

10 Below are the nexus-producing scenarios. These were taken directly from the BNA
11 survey, and in most cases, are verbatim.

12

13

14 1. Remote Sales

15

16 a. The corporation sells tangible personal property to residents in your state from
17 outside the state (e.g., by telephone, over the Internet, via catalog/direct mail, or
18 otherwise) and has an employee visit your state four or more times during the year.
19 (Yes – 37)

20

21 b. The corporation sells (...) and uses an employee or third party (e.g., independent
22 contractor, affiliated company, or other representative) to investigate, handle, or
23 resolve customer issues, provide training or technical assistance, or otherwise
24 provide customer service to customers in your state. (Yes – 39) (Covered by (a)(3)?)

25

26 c. The corporation sells (...) and delivers merchandise to customers in your state in
27 company-owned vehicles or by means other than common carrier or the U.S. Postal
28 Service. (Yes – 37) (Covered by (a)(3)?)

29

30 d. The corporation sells (...) and delivers merchandise to customers in your state in
31 returnable containers. (Yes – 24)

1 e. The corporation sells (...) and ships its products for distribution to a third-party
2 distributor located in the state that performs functions such as labeling, packaging,
3 and shipping. (Yes - 27)

4
5 f. The corporation sells (...) and provides in-state telephone or Internet kiosks that
6 allow customers to access inventories and purchase merchandise from remote
7 subsidiaries.

8
9 2. Temporary or Sporadic Presence

10
11 a. The corporation sells tangible personal property to residents in your state from
12 outside the state (e.g., by telephone, over the Internet, via catalog/direct mail, or
13 otherwise) and makes sales and/or accepts orders at the trade show. (Yes - 27)

14
15 b. The corporation sells (...) and limits trade show activities in the state to one to
16 five days annually. (Yes - 24)

17
18 c. The corporation sells (...) and sells tangible personal property while temporarily
19 located in your state for up to three days. (Yes - 34)

20
21 d. The corporation sells (...) and has employees or representatives occasionally
22 enter the state to meet with instate suppliers of goods or services. (Yes - 19)

23
24 e. The corporation sells (...) and makes remote sales of tangible personal property
25 to state residents and holds two or more one-day seminars in the state. (Yes - 27)

26
27 f. The corporation sells (...) and makes remote sales of tangible personal property
28 to state residents, holds two or more one-day seminars in the state, and has its
29 employees visit the state five times during the year. (Yes - 32)

30
31 3. Activities of Unrelated Parties

1 a. The corporation sells tangible personal property to residents in your state from
2 outside the state (e.g., by telephone, over the Internet, via catalog/direct mail, or
3 otherwise) and hires an unaffiliated printer in the state and stores raw materials or
4 finished goods at the in-state printer's plant.

5
6 b. The corporation sells (...) and hires an unrelated call center or fulfillment center
7 located in your state to process telephone and electronic orders that primarily
8 derive from out-of-state customers. (Yes - 27)

9
10 c. The corporation sells (...) and produces an "infomercial" that runs on an in-state
11 television channel and pays commissions to the local TV station based on a
12 percentage of sales to in-state consumers who made purchases using the phone
13 number or website address displayed on the "infomercial." (Yes - 17)

14
15 d. The corporation sells (...) and collects delinquent accounts using a collection
16 agency in your state or hires attorneys, or other third parties, to file collection suits
17 in courts in your state. (Yes - 16)

18
19 e. The corporation sells (...) and stores and ships items from an unrelated
20 distribution center in your state. (Yes - 31) (Covered by (a)(3)?)

21
22 4. Financial Activities

23
24 a. The corporation sells tangible personal property to residents in your state from
25 outside the state (e.g., by telephone, over the Internet, via catalog/direct mail, or
26 otherwise) and owns an interest in an investment partnership or LLC that has
27 operations in your state. (Yes - 13)

28
29 b. The corporation sells (...) and owns a general interest in a partnership that is
30 doing business in your state. (Yes - 16)

31

1 c. The corporation sells (...) and owns an interest in an LLC that is doing business in
2 your state and is involved in managing the LLC. (Yes – 20)

3
4 5. Activities of In-state Affiliates

5
6 a. The corporation is affiliated with an entity that sells tangible personal property
7 or services to customers in your state, and uses the in-state affiliate to accept
8 returns, take orders, perform customer service, or distribute advertising materials
9 on its behalf. (Yes – 36)

10
11 b. The corporation is affiliated (...) and sells tangible personal property over the
12 Internet or by catalog and has an affiliated company that operates a retail store in
13 your state. (Yes – 23)

14
15 c. The corporation is affiliated (...) and participates in a loyalty points program
16 with the in-state affiliate, allowing customers to earn points for purchases from
17 the corporation and redeem the points for merchandise at the affiliate's in-state
18 stores. (Yes – 30)

19
20 d. The corporation sells gift cards in affiliated in-state stores. (Yes – 27)

21
22 e. The corporation makes remote sales to residents of your state and owns at least
23 5 percent of an in-state affiliate that shares the corporation's logo. (Yes – 23))

24
25 f. The corporation makes remote sales to residents of your state and owns less than
26 5 percent of an in-state affiliate that shares the corporation's logo. (Yes – 20)

27
28 g. The corporation makes remote sales to residents of your state and accepts
29 returned items or exchanges items that were purchased from an affiliate's in-state
30 stores. (Yes – 30)

31

1 6. Internet Activities

2
3 a. The corporation makes remote sales of tangible personal property to residents in
4 your state from outside the state via a website and enters into an agreement with a
5 resident of your state in which the corporation pays commissions or fees for
6 referrals to the corporation’s website. Assume the annual gross receipts from sales
7 attributable to the arrangements total less than \$10,000. (Yes – 18)

8
9 b. The corporation is an Internet-based retailer with an out-of-state home office and
10 enters into an agreement with an in-state operator of a website. The website
11 operator hosts advertisements directing consumers to the website of the out-of-
12 state retailer, and is paid when a consumer clicks on the ad and buys a product from
13 the out-of-state retailer (per conversion). (Yes – 16)

14
15 c. The corporation leases space on a third-party’s Internet server located in your
16 state. Assume that space on the third-party’s server is also leased to several other
17 unrelated corporations. (Yes – 26)

18
19 d. The corporation leases space on a third-party’s network of Internet servers,
20 some of which are located in your state. Assume that the corporation’s data is on the
21 third-party’s Internet server in your state for less than six months during the year.
22 (Yes – 24)

23
24 e. The corporation leases space on a third-party’s network of Internet servers,
25 some of which are located in your state. Assume that the corporation’s data is on the
26 third-party’s Internet server for more than six months during the year. (Yes – 24)

27
28 7. Digital Goods

29
30 a. The corporation sells data, such as music files, to residents in your state and the
31 data is stored on a server located in your state. (Yes – 22)

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b. The corporation makes remote sales of “canned software” to residents in your state and then sends a representative to customize it to meet the customer’s specific needs. (Yes – 37)

8. Distribution and Delivery

a. The corporation makes remote sales into your state and picks up defective products or scrap materials in your state in taxpayer-owned vehicles. (Yes – 35)

b. The corporation makes remote sales into your state and picks up raw materials in your state in taxpayer-owned vehicles. (Yes – 26)

c. The corporation makes remote sales into your state and “back hauls” (i.e., picks up shipments at the destination or nearby location for delivery to another point) in corporate-owned trucks. (Yes – 27)

9. Third Party Solicitation Activities and Attributional Nexus

a. The corporation makes remote sales into your state and hires a third party to distribute flyers, coupons, and other printed promotional materials. (Yes – 20)

b. The corporation makes remote sales into your state and hires a third party to negotiate prices to buy. (Yes – 18)

c. The corporation makes remote sales into your state and hires a third party to negotiate prices to sell. (Yes – 28)

10. Transactions Involving Franchise Agreements

1 a. The corporation licenses intangible property to an in-state franchisee and the
2 corporation makes one [or more] inspection visit[s] to the franchisee's location per
3 year. (One visit – Yes, 24) (2-6 visits – Yes, 25) (6 or more visits – 27)

4
5 b. The corporation licenses intangible property to an in-state franchisee and the
6 corporation leases machinery and equipment worth [at least] \$20,000 to the
7 franchisee. (\$20,000 – Yes, 37) (\$100,000 – Yes, 37)

8
9 c. The corporation licenses intangible property to an in-state franchisee and the
10 corporation maintains and repairs the franchisee's equipment in your state. (Yes –
11 37)

12 13 11. Service Providers

14
15 a. The out-of-state corporation has employees that regularly (e.g., 12 or more times
16 per year) enter the state to deliver to in-state customers tangible personal property
17 that is incidental to the performance of a taxable service. (Yes – 33)

18
19 b. The out-of-state corporation has employees occasionally (e.g., less than 12 times
20 per year) enter the state to deliver to an instate customer tangible personal
21 property that is incidental to the performance of a taxable service. (Yes – 30)

22
23 c. The out-of-state corporation stores tangible personal property with a third party
24 in the state that is transferred to in-state customers as an incidental part of the
25 performance of a taxable service. (Yes – 31)

26 27 13. Cloud Computing

28
29 a. The out-of-state corporation sends an employee to your state to perform an
30 initial setup and then charges fees to in-state customers for the right to access non-

1 downloadable prewritten software that is hosted on a server in another state. (Yes –
2 18)

3
4 b. The out-of-state corporation hires an independent contractor in your state to
5 provide training to in-state customers and charges fees to in-state customers for the
6 right to access non-downloadable prewritten software that is hosted on a server in
7 another state. (Yes – 15)

8
9 c. The out-of-state corporation charges fees to in-state customers for the right to
10 access non-downloadable prewritten software that is hosted on a server in another
11 state and occasionally (e.g., one to 11 times per year) has employees meet with
12 customers in your state. (Yes – 16)

13
14 d. The out-of-state corporation charges fees to in-state customers for the right to
15 access non-downloadable prewritten software that is hosted on a server in another
16 state and regularly (e.g., 12 or more times per year) has employees meet with
17 customers in your state. (Yes – 17)

18
19 e. The out-of-state corporation sends an employee in your state to perform an
20 initial set up and then charges fees to in-state customers for the right to access
21 information on its website that is hosted on a server in another state. (Yes – 14)

22
23 f. The out-of-state corporation hires an independent contractor in your state to
24 provide training to in-state customers for the right to access information on its
25 website that is hosted on a server in another state. (Yes – 12)

26
27 g. The out-of-state corporation charges fees to in-state customers for the right to
28 access information on its website that is hosted on a server in another state and
29 occasionally (e.g., less than 12 times per year) has employees meet with customers
30 in your state. (Yes – 13)

31

1 h. The out-of-state corporation charges fees to in-state customers for the right to
2 access information on its website that is hosted on a server in another state and
3 regularly (e.g., 12 or more times per year) has employees meet with customers in
4 your state. (Yes – 14)

5
6 14. Registration with State Agencies/Departments

7
8 a. The out-of state corporation is registered with the state as a government vendor
9 or contractor. (Yes – 16)

10
11 15. Drop Shipments

12
13 a. The out-of-state corporation is a distributor that uses an in-state manufacturer,
14 who acts as a fulfilment agency in your state to pack and ship orders via common
15 carrier to in-state customers, and (a) the manufacturer holds title to the inventory
16 until the corporation directs the manufacturer to ship the order. (Yes – 21)

17
18 b. The out-of-state corporation is a distributor that uses an in-state manufacturer,
19 who acts as a fulfilment agency in your state to pack and ship orders via common
20 carrier to in-state customers, and (b) the corporation holds title to the inventory
21 until the corporation directs the manufacturer to ship the order. (Yes – 27)

22
23 c. The out-of state corporation is a distributor that contracts with an in-state
24 manufacturer to perform an order fulfilment service on the corporation's behalf in
25 which the manufacturer accepts phone and mail orders addressed to the
26 corporation, processes payments made payable to the corporation and packages
27 and ships inventory via common carrier to the corporation's customers, and (a) the
28 manufacturer holds title to the inventory prior to shipment. (Yes – 33)

29
30 d. The out-of state corporation is a distributor that contracts with an in-state
31 manufacturer to perform an order fulfilment service on the corporation's behalf in

1 which the manufacturer accepts phone and mail orders addressed to the
2 corporation, processes payments made payable to the corporation and packages
3 and ships inventory via common carrier to the corporation's customers, and (b) the
4 corporation holds title to the inventory prior to shipment. (Yes - 24)

5
6 e. The out-of state corporation is a distributor that contracts with an in-state
7 manufacturer to accept and process product returns on the corporation's behalf,
8 including evaluating products for defects, crediting the customer and maintaining
9 the product inventory, and (a) the corporation charges product return inventory
10 back to the manufacturer such that the manufacturer owns the returned inventory.
11 (Yes - 30)

12
13 f. The out-of state corporation is a distributor that contracts with an in-state
14 manufacturer to accept and process product returns on the corporation's behalf,
15 including evaluating products for defects, crediting the customer and maintaining
16 the product inventory, and (b) the corporation retains ownership of the product
17 return inventory. (Yes - 31)

18